# Supreme Court of the United States

OCTOBER TERM, 1962

No. 57

MICHAEL CLEARY,

Petitioner,

v.

EDWARD BOLGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONER

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Dated: August, 1962.

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## Cases Cited

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### Opinions Below

The opinion of the District Court (R. 7-34) is reported at 189 F. Supp. 237. The opinion of the Court of Appeals (R. 38-47) is reported at 293 F. 2d 368.

### Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1961 (R. 48).

Petition for rehearing *in banc* was denied on September 25, 1961, by the same panel of the Court of Appeals as

originally sat on the instant case (R. 49-50). Then, the Court of Appeals, sitting *in banc*, divided three-to-three on the petition for rehearing and accordingly denied rehearing on September 26, 1961, for lack of a majority in favor thereof (R. 51-52). An application by petitioner for leave to refile his petition for rehearing *in banc* was denied by all the active judges of the Court of Appeals on October 20, 1961 (R. 53).

The petition for certiorari was filed on December 23, 1961, and was granted February 19, 1962. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## Statutes Involved

Section 2283 of Title 28 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

> "Rule 5. Proceedings before the Commissioner
>
> (a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without necessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 41(a) of the Federal Rules of Criminal Procedure provides:

"Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located."

## Questions Presented

1. Whether it was an improvident exercise of federal equitable power to enjoin petitioner, a state officer, from testifying against respondent in a state criminal and in also a state administrative proceeding against respondent (both of which state proceedings had been instituted and were pending at the time the instant suit was commenced) where petitioner was present (but did not participate) in an interrogation of respondent by federal customs officers while respondent was illegally detained by the federal customs officers, which detention followed an illegal search and seizure of respondent's home by the federal customs officers (at which search and seizure petitioner was not even present).

2. Whether such injunction is prohibited by the provisions of Section 2283 of Title 28 of the United States Code.

## Statement

The order of the District Court herein (R. 35-37) enjoins petitioner Cleary, a state officer (*i.e.*, an investigator for the Waterfront Commission of New York Harbor) from testifying or producing any evidence against re-

spondent Bolger (1) in a criminal proceeding pending against Bolger in the Court of Special Sessions of the City of New York for petit larceny and (2) in a hearing pending against Bolger before the Waterfront Commission to determine whether to revoke or suspend Bolger's license as a hiring agent and Bolger's registration as a longshoreman. As appears more fully hereinbelow, petitioner has no evidence to produce against Bolger since the District Court enjoined the customs officers from turning any over and therefore only that part of the injunction prohibiting petitioner from testifying is at issue here. Both the state criminal prosecution and the Commission's hearing had been instituted and were pending at the time the instant suit for an injunction was commenced in the District Court (R. 4; complaint, pars. 15-17).

The facts, as set forth in the opinion of the District Court (Bryan, J.), rendered after trial, are as follows. Respondent Bolger is a hiring agent and longshoreman, licensed and registered, respectively, as such by the Waterfront Commission and he is employed on the New York waterfront (R. 8). On Saturday morning, September 12, 1959, between about 8:00 and 8:30 A.M., certain federal customs officers who were on the lookout for thefts from the piers, particularly thefts of liquor, observed Bolger take a cardboard carton from a deserted pier and place the carton in his car (R. 9-10). Upon a search of both Bolger's person and his car, the customs officers found in Bolger's car two windshield wipers and six spark plugs stamped "Made in England" (R. 10). In addition, Bolger, when questioned, said that he had six or eight bottles of liquor at home which he had bought from crew members who, in turn, he said, had bought the liquor from ship's stores (R. 10). At about 9:00 A.M. the customs officers decided to take Bolger into custody (R. 10). The District Court found that the initial search and arrest of Bolger by the customs officers were legal under the authority conferred by the Tariff Act of 1930 (R. 23-25).

Respondent Bolger was taken to an office of Customs in New York City and, after some preliminary questions, he admitted that he had some thirty or forty bottles of liquor obtained from seamen, and additional merchandise, at his home in Keansburg, New Jersey (R. 11). Later in the interrogation, Bolger signed a written consent to a search of his home (R. 11), which the District Court found to be void and of no effect because, after first refusing to sign the consent without consulting a lawyer, Bolger was induced to sign the consent by misrepresentations that his consent was actually not needed for a search of his home (R. 11, 27-28).

Shortly before 11:00 A. M., the customs officers, together with respondent Bolger, left New York in a government car for Bolger's house in Keansburg, New Jersey, where they arrived about noon (R. 12). A search was made of Bolger's house for about two hours, during which certain apparently contraband merchandise was found, including a Stenorette tape recording machine made in West Germany (R. 12). The District Court found that, from about 11:00 A. M. to 1:00 P. M., a United States Commissioner was in attendance that day at the United States Court House a few blocks away from the office of Customs (R. 26).

The federal customs officers, together with respondent Bolger, left Keansburg, New Jersey, at about 2:00 P. M., and they arrived at one of the offices of Customs in New York City at about 4:00 P. M. (R. 12). The customs officers took back with them the apparently contraband merchandise, including the Stenorette tape recorder, which they found in Bolger's home (R 12-13).

It will be noted that petitioner was not present during, and thus did not participate, in any of the foregoing events. The Waterfront Commission, which worked in close cooperation with Customs, had been informed of Bolger's detention by Customs (R. 12, 13). Petitioner was present at the Customs office upon Bolger's return

from his home and ascertained that Bolger had a key to the basement of an apartment house in New York City which Bolger said was a tool room where he occasionally repaired pier equipment (R. 13). Petitioner and a customs officer drove Bolger to the basement tool room which was searched without finding anything. Petitioner and the customs officer then returned with Bolger to the office of Customs at about 5:45 P. M. (R. 13). (Since no incriminating evidence was found in the search of the basement tool room, it is not a factor in the case.)

Respondent Bolger was then asked if he was willing to make a statement concerning the merchandise seized from his home (R. 13). Bolger was told that he did not have to make such a statement and that anything said could be used against him (R. 13). Bolger apparently did not object and he was sworn and questioned before a customs shorthand reporter (R. 13). Petitioner, who was present, merely observed and did not participate in the questioning (R. 13). During the course of this questioning, Bolger made some incriminating statements, both as to the merchandise seized generally in his home and the Stenorette tape recorder (R. 13, 29). The questioning concluded at about 7:00 P. M. and Bolger was permitted to leave at about 7:20 P. M. (R. 13).

No federal charges were ever lodged against respondent Bolger (R. 14). However, about a month later, Bolger was charged by the New York authorities with grand larceny for theft of the Stenorette tape recorder, one of the articles seized at Bolger's house by the customs officers (R. 14). As a result of the New York State larceny charge, the Waterfront Commission instituted proceedings to revoke or suspend Bolger's longshoreman's registration and hiring agent's license and temporarily suspended Bolger's registration and license (R. 14). Under the Waterfront Commission Act, a hiring agent's license may be revoked or suspended for lack of good character

and integrity (New York McKinney's Unconsolidated Laws 9818, 9814; New Jersey Statutes Annotated 32:23-18, 32:23-14) and a longshoreman's registration (as well as a hiring agent's license) may be revoked or suspended for an act of misappropriation on the waterfront (New York McKinney's Unconsolidated Laws 9913; New Jersey Statutes Annotated 32:23-93). (While it does not appear in the record, the Commission's charges that Bolger lacks good character and integrity include, in addition to the charge of misappropriation of the Stenorette tape recorder, the charge that Bolger possessed other merchandise at his home knowing it to be stolen.)

The instant action was commenced by respondent Bolger after both the New York criminal prosecution and the Waterfront Commission's revocation proceeding had been instituted against him (R. 8-9). Bolger had originally named as defendants herein the United States of America and the Secretary of the Treasury but the action as to these defendants was dismissed prior to the trial below in the District Court (R. 8). Bolger also instituted a second injunction action against the members of the Waterfront Commission, themselves (R. 9). This second action was dismissed by the District Court after a consolidated trial below (R. 33-34).

The District Court determined that respondent Bolger's house had been illegally searched and that property had been illegally taken therefrom by the federal customs officers; that Bolger's detention by the customs officers after 11:00 A. M. without arraignment before a United States Commissioner (who was in attendance nearby from 11:00 A. M. to 1:00 P. M.) was also illegal; that after such illegal search and seizure and while illegally detained, Bolger gave a highly incriminating statement before a customs reporter; that the detention and search and seizure were illegal by virtue of being violative of Rules 5(a) (prompt arraignment) and 41(a) (issuance of warrant for

search and seizure), respectively, of the Federal Rules of Criminal Procedure; and that Bolger's statement resulted from both the illegal search and seizure and the illegal detention (R. 25-30).

The District Court issued an injunction prohibiting the federal customs officers and also the customs shorthand reporter in effect from testifying or producing any evidence in any state proceeding against respondent Bolger (R. 29-30, 35-37). The District Court stated this injunction was being granted in the exercise of its supervisory powers over federal law enforcement agents (R. 30). However, the District Court denied the application by Bolger for a return of the property seized from his home upon the ground that this property was contraband, thus freezing the property in the custody of Customs in view of the injunction against the customs officials prohibiting them from producing the property in any state proceeding against Bolger (R. 33).

With respect to petitioner, the District Court made the following finding (R. 32):

> "In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary [petitioner] was merely a witness to them . . ."

However, the District Court also enjoined petitioner in effect from testifying or producing any evidence in any state proceeding against respondent Bolger (R. 35-37). The ground stated by the District Court for the issuance of the injunction against petitioner was that it was necessary in order to effectuate, and as an incident to, the injunction against the federal customs officers because petitioner "participated as a witness in the unlawful acts of

the federal officers acting on behalf of the United States" (R. 33). The District Court stated (R. 32):

> "If no injunction can be issued against Cleary [petitioner] he is in a position to testify in the state court proceedings as to Bolger's admissions before the federal agents and thus to act as a vehicle to defeat the policy enunciated in the *Rea* case of protecting the privacy of the citizen against invasion in violation of the federal rules. Thus, the federal agents would be able to flout the rules and to use the fruits of their unlawful conduct in the state proceedings through the medium of Cleary."

By judgment and decision dated August 4, 1961, the Court of Appeals affirmed the District Court by a two-to-one vote (R. 38-48). This decision was rendered by a panel comprised of Circuit Judges Clark and Waterman and also District Judge Anderson (who dissented).

Petitioner filed a petition for rehearing *in banc* dated August 18, 1961 (R. 48). On September 25, 1961, this petition for rehearing was denied by the original panel of the Court of Appeals, Circuit Judges Clark and Waterman voting to deny the petition and District Judge Anderson voting to grant the petition (R. 49-50). Then, on September 26, 1961, the Court of Appeals rendered the following decision with respect to petitioner's petition for rehearing *in banc* (R. 51):

> "Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application."

Subsequently, by application dated October 10, 1961, petitioner applied for leave to refile his petition for rehearing *in banc* so as to give the newly appointed Judges of the

Court of Appeals an opportunity to vote upon the matter (Circuit Judges Hays, Kaufman and Marshall). This application was denied by order of the Court of Appeals dated October 20, 1961, "[a]ll the active judges concurring" (R. 53-54).

## Summary of Argument

### I

A. 1. The injunction against petitioner is in conflict with the applicable decisions of this Court. This Court has held that the federal courts should not enjoin state officers from producing illegal state search and seizure evidence or state wiretap evidence, or enjoin federal officers from testifying with respect to, or producing, illegal federal search and seizure evidence, in state criminal prosecutions. *Stefanelli* v. *Minard*, 342 U. S. 117; *Pugach* v. *Dollinger*, 365 U. S. 458; *Wilson* v. *Schnettler*, 365 U. S. 381. Together, these decisions unmistakably spell out a policy against piecemeal interference by the federal courts in state criminal prosecutions. The decision in *Rea* v. *United States*, 350 U. S. 214, that a federal agent was subject to an injunction prohibiting him from producing or testifying about illegal federal search and seizure evidence in a state prosecution is entirely congruent with such policy since *Rea* rests upon a singular state of facts involving the integrity of a federal court order, *i.e.*, a federal suppression order in a prior federal criminal prosecution against the same criminal defendant. Further, in *Rea*, the injunction was against a federal officer and not, as here, against a state officer.

2. The "insupportable disruption" of state law enforcement proceedings which was referred to in *Stefanelli* has become a harsh reality in this case. Both the New York criminal prosecution and the Waterfront Commission's revocation proceedings have been required to mark time

for three years pending the outcome of this litigation. Plainly, if this type of interruption is multiplied upon any scale at all, the result, will be, in somber fact, a stultification of state law enforcement proceedings.

3. The vindication of federal rights does not require piecemeal interference by the federal courts in state criminal proceedings. In effect, the instant case is simply an application to the equity side of this Court to nullify or circumvent prior decisions rendered on the law side of this Court. The decisions by this Court at law were not the result of an unyielding formalism—such as led to the historic conflict between King's Court and Chancery—but rather were made upon the merits and accordingly should be followed by this Court in equity as well. If those decisions are to be changed, this should be done directly and forthrightly at law upon a reconsideration of the merits, and not by resort, as here, to a flanking attack which not only obscures the considerations involved in the merits but which creates a needless conflict between the federal and state courts.

4. Moreover, it is problematical whether or not the result at law would actually be adverse to respondent Bolger. This is particularly true in light of this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643. While the instant case involves, upon the merits, many novel legal questions that are open in this Court, such questions should be decided, at least in the first instance, in the usual manner at law in the state courts subject to the review available in this Court. Unless the basis for federal piecemeal interference with state law enforcement proceedings is to be immeasurably expanded, the mere uncertainty of the result at law (in contradistinction to an established adverse result as in *Pugach*) is not an adequate ground for federal equitable jurisdiction. Moreover, the real basis for the claimed inadequacy of the remedy at law (a claim never recognized by this Court) was that no federal rights were vindicable

at all in this entire area (a fact no longer true by virtue of *Mapp*), and not that there might be peripheral differences in the admissibility of evidence between the federal and state courts.

5. The statement by the court below that petitioner was being enjoined not in his capacity as a state officer but as a witness to illegal activities by federal agents is irreconcilable with the record facts which show that petitioner acquired the information in question in the performance of his official duties as a Waterfront Commission investigator. Further, this characterization simply begs the questions at issue in this case.

B. 1. The policy against federal piecemeal interference with state law enforcement proceedings is equally applicable to a hearing of a state law enforcement agency such as the Waterfront Commission. The state criminal prosecution and the Commission's revocation proceedings are simply different aspects of related state action.

2. Upon established principles of administrative law, respondent Bolger is first required to exhaust his administrative remedies before instituting court proceedings. In addition, the judicial review provisions of the Waterfront Commission Compact, which was approved by Congress, specifically provides for review of only the "final decision or action" of the Commission and then only in the state courts.

II

1. The injunction against petitioner's testimony in New York's criminal prosecution is prohibited by Section 2283 of the Judicial Code. Petitioner's testimony is indispensable to New York's criminal prosecution against respondent Bolger, and, if the injunction stands, New York will be required to dismiss its criminal case against Bolger. The prohibition of Section 2283 against staying proceedings in state courts embodies a long-standing and comprehensive

rule of comity. It thus prohibits a restraint of the parties as well as all steps taken or which may be taken in the state court from the institution to the close of final process. Since the effect of the injunction is to require New York to dismiss its criminal case against Bolger, it follows that the injunction is inconsistent with the comprehensive policy of comity embodied in Section 2283. Further, the injunction against petitioner is equivalent to an injunction against the State of New York, as a party, for the State is not a natural person and can only act as a party through its officers, attorneys and agents, including particularly petitioner whose testimony is indispensable to the prosecution.

2. The decision by this Court in the *Rea* case does not constitute authority for holding that the injunction here is not prohibited by Section 2283. The injunction in *Rea* was clearly ancillary to the prior federal suppression order and, therefore, came within the expressed exception of Section 2283 prohibiting a stay of state court proceedings by the federal court "except . . . where necessary . . . to protect or effectuate its judgments", the term "judgment" encompassing interlocutory as well as final orders. Further, the injunction in *Rea* was against a federal, and not, as here, a state officer.

3. Nor does the fact that the Civil Rights Act (*i.e.*, 28 U.S.C. 1343(4)) is the apparent basis for federal jurisdiction herein bring this case within the exception of Section 2283 prohibiting a stay "except as expressly authorized by Act of Congress". The District Court thought that federal jurisdiction could be predicated upon 28 U.S.C. 1343(4) conferring jurisdiction over any action brought under any "Act of Congress providing for the protection of civil rights, including the right to vote". The District Court reached this result by reasoning that the Federal Rules of Criminal Procedure create substantive federal rights enforceable independently of any federal criminal proceeding. However, the enabling provisions of 18 U.S.C.

3771 as well as Rule 1 specifically make it plain that the Federal Rules only prescribe the procedure *in* federal criminal proceedings. Further, while the Federal Rules may have the force and effect of statutory law for their intended purposes, the Rules are not *strictissimi juri* an Act of Congress. Nor are the Federal Rules an "Act of Congress providing for the protection of civil rights, including the right to vote" within the intendment of 28 U.S.C. 1343(4) for, as the legislative history shows, Section 1343(4) was enacted as part of the Civil Rights Act of 1957 simply to conform the Judicial Code to such Civil Rights Act and no sweeping and radical enlargement of federal jurisdiction was intended. In any event, 28 U.S.C. 1343(4) does not come within the exception "except as expressly authorized by Act of Congress" since the only Acts of Congress which have been held to come within this exception have either vested the federal courts with exclusive jurisdiction over enforcement of a federal regulatory scheme or have explicitly contemplated the cessation of all other court proceedings with respect to the same subject matter. The Civil Rights Act (28 U.S.C. 1343(4)) is no such Act. Rather, it simply particularizes an area of the federal question jurisdiction for which no jurisdictional amount is required.

## I

## It was an improvident exercise of federal equitable power to enjoin petitioner, a state officer, from testifying in New York's criminal prosecution and in the Waterfront Commission's revocation proceedings.

### A. It was improvident to enjoin petitioner from testifying in New York's criminal prosecution.

While the injunction herein prohibits petitioner from testifying or producing any evidence against respondent Bolger in both New York's criminal prosecution and the

Waterfront Commission's revocation proceedings against Bolger, petitioner, as has been noted, does not have any evidence that was seized from Bolger by the customs officers since the District Court enjoined the customs officers from turning any over. And since Bolger's application for a return of the seized property was denied by the District Court, such property or evidence is frozen in the custody of Customs. Accordingly, the only part of the injunction actually at issue here is that prohibiting petitioner from testifying as to what he saw and heard at Customs after Bolger's return to Customs from his home in New Jersey, including particularly Bolger's statement before a customs stenographer.

1. The injunction against petitioner—an injunction prohibiting a state officer from testifying in a state criminal prosecution which had been instituted and was pending at the time of the commencement of the instant action—is in conflict with the applicable decisions of this Court. In *Stefanelli* v. *Minard*, 342 U. S. 117, suit was brought under the Civil Rights Act to enjoin the use in a criminal trial in the State of New Jersey of evidence obtained by the New Jersey police in a search and seizure which, if made by federal officers, would concededly have violated the Fourth Amendment. This Court, however, declined to decide whether the complaint set forth a cause of action under the Civil Rights Act but instead held that an exercise of federal equitable jurisdiction in such circumstances would be improper. The Court enunciated a broad principle of non-interference with state criminal proceedings, stating (343 U. S., at pp. 120-121, 123-124):

> "We hold that the federal courts should refuse to to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-

American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, e.g., 28 U.S.C. §§ 1341, 1342, 2283, 2284(5), 28 U.S.C.A. §§ 1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law. E.g., Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962, 85 L. Ed 1416; Beal v. Missouri Pacific R. Co., 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577; Spielman Motor Co. v. Dodge, 295 U. S. 89, 55 S. Ct. 678, 79 L. Ed. 1322; Fenner v. Boykin, 271 U. S. 240, 46 S. Ct. 492, 70 L. Ed. 927. It has received striking confirmation even where an important countervailing federal interest was involved.

* * * * * *

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the

misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

*Stefanelli* was followed by the decision of this Court in *Rea* v. *United States*, 350 U. S. 214. In *Rea*, the Court, by a 5-4 vote, held that a federal narcotics agent was subject to an injunction prohibiting him from testifying with respect to, or producing, seized narcotics in a state narcotics prosecution. The narcotics had been seized by the federal agent pursuant to a search warrant improperly issued in violation of the Federal Rules of Criminal Procedure and had been ordered suppressed in a prior federal prosecution against the same person who was the defendant in the state prosecution. The Court specifically pointed out that under 28 U.S.C. 2463, which was applicable, the narcotics "shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and the decrees of the courts of the United States having jurisdiction thereof" (350 U. S., at p. 215). Further, the effect of the suppression order in *Rea* was that the suppressed property "shall not be admissible in evidence at any hearing or trial" and, therefore, the motion to enjoin in *Rea* was made "to prevent the thwarting of the federal suppression order". *Wilson* v. *Schnettler*, 365 U. S. 381, 387. Accordingly, the central issue in the *Rea* case was the integrity of a federal court order since in *Rea* the federal narcotics agent was attempting to circumvent and defeat the prior federal order which had suppressed the narcotics.

Then, upon the same day in the 1960 Term, the Court decided *Wilson* v. *Schnettler, supra*, and *Pugach* v. *Dollinger*, 365 U. S. 458. In *Wilson*, suit was brought by the defendant in a state narcotics prosecution, who had been

arrested without a warrant by federal agents and upon whose person the federal agents had found narcotics, to enjoin the testimony of the federal agents and the use of the narcotics as evidence in the state prosecution. No federal prosecution had ever been instituted against the state criminal defendant and accordingly no prior federal suppression order was involved. The Court held that the complaint had been properly dismissed upon the alternative grounds (1) that, though the complaint alleged that the arrest was made without a warrant, there was no allegation that the arrest was made without probable cause and (2) that there was no federal equitable jurisdiction to interfere with the state criminal proceeding for the reasons enumerated in *Stefanelli*. As already noted, the Court distinguished its decision in *Rea*, because there an injunction was issued against the federal agents "to prevent the thwarting of the federal suppresson order" in the prior federal prosecution (365 U. S., at p. 387). *Wilson* plainly and explicitly stated that it was not resting solely upon the defectiveness of the complaint but also upon the principle of non-interference with state criminal proceedings previously enunciated in *Stefanelli*, as follows (365 U. S., at pp. 385-86):

> "There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 U. S. 254, 260, 42 S. Ct. 309, 310, 66 L. Ed. 607. Another is that federal

courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent * * *.' Douglas v. City of Jeannette, supra, 319 U. S. at page 163, 63 S. Ct. at page 881.

By this action, petitioner not only seeks to interfere with and embarrass the state court in his criminal case, but he also seeks completely to thwart its judgment by relitigating in a trial *de novo* in a federal court the very issue that he has already litigated in the state court. 'If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. * * * To suggest these difficulties is to recognize their solution.' Stefanelli v. Minard, 342 U. S. 117, 123-124, 72 S. Ct. 118, 121-122, 96 L. Ed. 138."

Mr. Justice Stewart, who concurred in *Wilson*, stated that he could not base affirmance upon the ground that the complaint failed to allege that the arrest was made without probable cause but that he was limiting his concurrence to the ground that the case did not warrant equitable relief under the standards of *Stefanelli*.

And in the decision the same day by the Court in *Pugach*, a federal injunction against the use of state wiretap evidence in a state prosecution was denied. One of the decisions cited in the Court's short *per curiam* opinion in *Pugach* denying the injunction was *Stefanelli*.

Together, these decisions—*Stefanelli*, *Wilson*, and *Pugach*—decide the major variants in this area and hold

that the federal courts should not enjoin state officers from producing illegal state search and seizure or state wiretap evidence in a state criminal prosecution (*Stefanelli* and *Pugach*) and that the federal courts should also not enjoin federal officers from testifying with respect to, or producing, illegal federal search and seizure evidence in a state prosecution (*Wilson*). Together, these decisions unmistakably spell out a policy against piecemeal interference by the federal courts in state criminal prosecutions, a policy which not only is applicable here but which, by the decision in *Wilson*, subsumes the instant case since here the injunction is against a state, and not a federal, officer. The decision in *Rea* is entirely congruent with this policy against piecemeal interference in state criminal prosecutions since *Rea* rests upon a singular set of facts involving the integrity of a federal court order, *i. e.*, a prior federal suppression order. Further, in *Rea*, the injunction was against a federal, and not, as here, a state officer.

The unprecedented decision in this case, constituting the first time, to our knowledge, that a federal court has ever interfered with *state* conduct of a *state* criminal prosecution, is thus clearly in conflict with the applicable decisions of this Court.

2. The "insupportable disruption" of state law enforcement proceedings which was referred to in *Stefanelli* has become a harsh reality in this case. New York's criminal prosecution for larceny was instituted against respondent Bolger in October, 1959 (R. 4, 14). Shortly thereafter, the Commission instituted its proceeding to revoke Bolger's hiring agent's license and longshoreman's registration (R. 4, 14). Thus, the State's criminal prosecution and the Commission's revocation proceedings have been both required to mark time for three years pending the outcome of this litigation, which is essentially an interlocutory appeal to the federal courts by Bolger and which has involved the State's officers in a full plenary trial in the District Court

and in a subsequent round of appeals to this Court. Plainly, if this type of interruption is multiplied upon any scale at all, the result will be, in somber fact, a stultification of state law enforcement proceedings.

The disruptive effect which the injunction here would have upon state law enforcement proceedings was cogently pointed out by Judge Anderson in his dissent in the court below, wherein he stated (R. 47):

> "Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the 'insupportable disruption' which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951)."

Further, an affirmance by this Court of the injunction here would have radiating consequences which it would not be possible to contain. An affirmance here would inevitably beget a large progeny of cases seeking to apply or to extend this case. It would become a common defense tactic to seek to delay and obstruct a state prosecution by applying to the federal courts for an injunction. Nor, we submit, is this hyperbole, for what we are saying here was stated by this Court, itself, in *Stefanelli*, wherein it stated that, if the injunction there requested were sanctioned, "Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal

forum, with review if need be to this Court, to determine the issue" (342 U. S., at p. 123) (*supra*, p. 16).

Furthermore, with respect to federal criminal proceedings, themselves, only last Term, this Court, in an unanimous decision, made it clear that motions to suppress the evidentiary use of material allegedly procured through an illegal search and seizure, whether such motions were made before trial or before indictment, were to be treated as interlocutory orders not subject to appeal because the "insistence [by Congress from the very beginning in the First Judiciary Act] on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases" and because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law". *DiBella* v. *United States*, 369 U. S. 121, 124, 126. As applied to interlocutory appeals from state criminal prosecutions to the federal courts, the force of these considerations is compounded since they are reinforced by "considerations governing . . . perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States". *Stefanelli* v. *Minard*, *supra*, at p. 120.

3. It is not required here to make a choice between the policy against federal piecemeal interference with state criminal proceedings, on the one hand, and the vindication of federal rights, on the other. For the protection of federal rights does not require piecemeal interference by the federal courts in state criminal proceedings.

If federal rights have been violated, those rights may, and should be, asserted in the usual and time-honored manner at law in the state prosecution subject to the ulti-

mate review available in this Court. However, it is argued that federal equitable intervention in state criminal prosecutions is necessary because the particular evidence in question is admissible, insofar as federal law is concerned, in the state courts by virtue of prior decisions at law by this Court. Thus, under this argument, resort is had to the equity side of this Court in order, in effect, to nullify or circumvent prior decisions rendered on the law side of this Court.

When, during the formative period of English law, the Lord Chancellor rendered decisions that were contrary to those of the Kings Court, he was at least acting out of reasons of historical necessity—the existence of two competing and conflicting systems of law in the same state. Walsh, *Equity*, §§ 3-5 (1930 ed.). The reason for the development of equity's exclusive jurisdiction—*i.e.*, a distinct and conflicting body of substantive law—lay in the historical fact that there did exist such two competing sets of courts. But for the same court—this Court—to develop a new body of federal substantive rights on its equity side that is in conflict with its decisions at law would be without justification either in history or reason. In effect, the Court would simply be warring upon itself and enjoining its own decisions.

There is no warrant for such an anachronistic solution. For the only barrier that exists at law is self-imposed. If the decisions of the King's Court sometimes shocked the conscience, the reason was that the King's Court had rendered itself powerless to do justice because of its own insistence upon an unyielding formalism. But surely this Court suffers from no such impotency on the law side. The decisions by this Court at law in this area were not the result of self-imposed metaphysical difficulties but rather were made upon the merits and accordingly should be followed by this Court in equity as well. If those decisions are to be changed, this should be done directly and

forthrightly at law upon a reconsideration of the merits, and not by resort, as here, to a flanking attack which not only obscures the consideration involved in the merits but which creates a needless conflict between the federal and state courts.

4. Moreover, it is problematical whether or not the result at law would actually be adverse to respondent Bolger. This is particularly true in light of this Court's recent decision in *Mapp* v. *Ohio*, 367 U. S. 643, holding that the state courts are constitutionally required by due process to exclude illegal search and seizure evidence. The decision in *Mapp* has already received full and unbegrudging implementation in the New York courts. E.g., *People* v. *O'Neil*, 11 N. Y. 2d 148, 227 N.Y.S. 2d 416 (1962); *People* v. *Loria*, 10 N. Y. 2d 368, 223 N.Y.S. 2d 462 (1961).

In fact, the explicit promise of *Mapp* is that the decision eliminates any further conflict between federal and state courts (367 U. S., at pp. 657-8).

> "Moreover, as was said in Elkins, '[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.' 364 U. S. at page 221, 80 S. Ct. at page 1446. Such a conflict, *hereafter needless*, arose this very Term, in Wilson v. Schnettler, 1961, 365 U. S. 381, 81 S. Ct. 632, 5 L. Ed. 2d 620, in which, and in spite of the promise made by Rea, we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis

> of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as Rea and Schnettler, each pointing up the hazardous uncertainties of our heretofore ambivalent approach." (Emphasis supplied)

The position of the Court below, however, was that the applicability of *Mapp* was unclear in several respects and that, therefore, *Mapp* did not ensure respondent Bolger an adequate remedy at law (R. 42). Actually, this entire case bristles with novel legal questions. But, as we shall seek to show, the mere uncertainty of the result at law is not a sound argument for the injunction here but, rather, this is an argument which actually cuts the other way.

Accordingly, we shall discuss very briefly the admissibility of petitioner's testimony in this case under present decisions to show the nature of the questions that are involved. First, whether incriminating statements induced by an illegal federal search and seizure are inadmissible even in a federal criminal proceeding under the "fruit of the poisonous tree" doctrine is an open question in this Court which, however, may be decided by this Court this Term. *Wong Sun* v. *United States*, 288 F. 2d 366 (9th Cir. 1961), certiorari granted, 368 U. S. 817. Assuming the applicability of the "fruit of poisonous tree" doctrine to respondent Bolger's statements, there is the further question whether the combined effect of the decisions by this Court in *Mapp* and in *Elkins* v. *United States*, 364 U. S. 206 (tangible evidence obtained as the result of an illegal state search and seizure is inadmissible in a federal prosecution) would preclude oral testimony by petitioner, a state officer, in a state prosecution against Bolger, as to incriminating statements made by Bolger.

Secondly, with respect to the illegality of respondent Bolger's federal detention, this presents another open question—whether the testimony by petitioner, a state officer, would be inadmissible for this reason in a state prosecution against Bolger. Petitioner's testimony against Bolger would not be violative of due process. *Gallegos* v. *Nebraska*, 342 U. S. 55. The question however would appear to involve the applicability of the recent decision by the Court in *Coppola* v. *United States*, 365 U. S. 762, holding that a confession obtained by FBI agents through interrogation of a person who had been arrested and illegally detained by local police officers was not inadmissible in a *federal* prosecution against such person.

Finally another question concerns the assumption by the court below that the Federal Rules of Criminal Procedure create substantive federal rights that are enforceable as such independently of any federal criminal proceeding and that the injunction against petitioner was justifiable upon this ground. This conclusion by the court below is directly contrary to the decision by the Seventh Circuit in *Wilson* where it was explicitly held that Federal Rules do not create such substantive federal rights (275 F. 2d 932, 935). This conclusion, moreover, would appear to be doubtful in principle, at least as applied in this case. The Federal Rules were promulgated pursuant to the authority of 18 U.S.C. § 3771, which empowers this Court "to prescribe, from time to time, rules of pleading, practice and procedure with respect to any or all proceedings . . . in criminal cases". In accordance with this narrowly confined power to prescribe the practice *in* federal criminal proceedings, Federal Rule 1, relating to the scope of the Rules, specifically states that the "rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings". There certainly would appear, therefore, to be no warrant for the conclusion by the court below

that the Federal Rules constitute a substantive basis for enjoining the testimony of petitioner, a state officer, in a state—not a federal—criminal proceeding.

In any event, what is clear is that this case presents a thicket of legal questions that are open in this Court. These questions should be decided, at least in the first instance, in the usual manner at law in the state courts subject to the review available in this Court, as is the rule respecting every other federal right of a state criminal defendant. Never before has it been suggested that the federal courts may interfere with state criminal proceedings simply because it is uncertain what the result may be at law. In the other cases in this area, such as *Stefanelli* and *Pugach*, the result at law had already been established adversely to the plaintiff in equity by prior decisions of this Court. Here, in contradistinction, it cannot even be shown by respondent Bolger, who has the burden in this respect as the plaintiff in equity seeking to disrupt New York's criminal prosecution, that he has no remedy at law. If the mere uncertainty of the result at law is to be a ground for federal equitable jurisdiction, then surely the basis for federal piecemeal interference with state law enforcement proceedings will have been immeasurably expanded. Every peripheral question in this area, including all of the manifold variants of *Mapp*, may permissibly be litigated in the first instance via interlocutory appeals from state prosecutions in the form of suits for injunctions in the District Courts.

The court below suggested that, in the event the various problems left unsolved by *Mapp* were clarified so that it became clear that the injunction here was in fact unnecessary, application could then be made for a dissolution of the injunction (R. 43). This is not a satisfactory solution. For, unless decided in this case at law, it could be years before all of the open questions in this case are definitely resolved.

Moreover, even assuming the ultimate admissibility of petitioner's testimony at law and apart from our prior contention that any decision at law on the merits should either be followed in equity or forthrightly changed at law, the remedy at law would not for this reason be inadequate. For the real basis for the claimed inadequacy of the remedy at law (a claim never recognized by this Court) was that no federal rights were vindicable at all in this entire area (a fact no longer true by virtue of *Mapp*), and not that there might be peripheral differences in the admissibility of evidence between the federal and state courts. This, we believe, is the true basis for this Court's promise in *Mapp* that such decision eliminates any further conflict between the federal and state courts.

5. The court below stated that petitioner "is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents" (R. 41). Apart from everything else, this characterization respecting petitioner's capacity or status is irreconcilable with the record facts. Petitioner was present at Customs because Customs, which works in close cooperation with the Waterfront Commission, notified the Commission of respondent Bolger's detention (R. 1231). The District Court specifically found that petitioner "was present at the questioning as a representative of the Waterfront Commission, a bi-state agency of the States of New York and New Jersey as a result of information from the Customs Service to the Commission concerning the Bolger case" and that this "was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront" (R. 31). Accordingly, the injunction prohibits petitioner, a state officer, from testifying in state law enforcement proceedings as to the information that he acquired in the course of the performance of his official duties.

Further, to say in these circumstances where the injunction nullifies the State's prosecution, that petitioner is being enjoined as a witness, and not as a state official, is to beg the questions at issue, namely, the propriety of the injunction in the light of the policy against federal piecemeal intervention in state law enforcement proceedings and also in the light of the rule of comity embodied in 28 U.S.C. 2283 (Point II, *infra*).

**B. It was improvident to enjoin petitioner from testifying in the Waterfront Commission's revocation proceedings.**

1. The policy enumerated by this Court in *Stefanelli* against federal piecemeal interference with state law enforcement proceedings is equally applicable to a hearing by a state law enforcement agency such as the Waterfront Commission. The Commission is charged with the task of eliminating racketeering and other evils on the New York waterfront. See, generally, *DeVeau* v. *Braisted*, 363 U. S. 144. Accordingly, no valid distinction can be drawn, insofar as the policy of *Stefanelli* is concerned, between the state criminal prosecution pending in the New York courts and the revocation proceedings pending before the Commission. In fact, both are simply different aspects of related state action.

2. Further, upon established principles of administrative law, the instant suit by respondent Bolger to enjoin petitioner's testimony before the Commission is premature since Bolger is required to first exhaust his administrative remedies. E.g. *Myers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41. Indeed, the judicial review provisions of the Waterfront Commission Compact, which has been approved by Congress, specifically contemplate that only the Commission's "final decision" shall be reviewable and then

only in the state courts in the first instance. Thus, Article XI of the Compact provides as follows:

"Article XI

Hearings, Determinations and Review

• • •

"6. *Upon the conclusion of the hearing,* the commission shall take such *action* upon such findings and determination as it deems proper and shall execute an order carrying such findings into effect. The *action* in the case of an application for a license or registration shall be the granting or denial thereof. The action in the case of a licensee shall be revocation of the license or suspension thereof for a fixed period or reprimand or a dismissal of the charges. The *action* in the case of a registered longshoreman shall be dismissal of the charges, reprimand or removal from the longshoremen's register for a fixed period or permanently.

"7. The *action* of the commission in denying any application for a license or in refusing to include any person in the longshoremen's register under this compact or in suspending or revoking such license or removing any person from the longshoremen's register or in reprimanding a licensee or registrant *shall be subject to judicial review* by a proceeding instituted in either state at the instance of the applicant, licensee or registrant *in the manner provided by the law of such state for review of the final decision or action of administrative agencies of such state,* provided, however, that notwithstanding any other provision of law the court shall have power to stay for not more than thirty days an order of the commission suspending or revoking a license or removing a longshoreman from the longshoremen's register." (67

Stat. 541, 554; McK. Unconsol. Laws 9850, 9851; N.J.S.A. 32:23-50, 32:23-51) (Emphasis supplied)

Hence, Section 6 provides that the "action" of the Commission "upon the conclusion of the hearing" shall be, in the case of a licensee, revocation or suspension of the license, or a reprimand, or dismissal of charges, and, in the case of a longshoreman, dismissal of charges, reprimand or removal from the longshoremen's register for a fixed period or permanently. Section 7 then provides that the Commission's "action" (using the same language as Section 6, prescribing the "action" to be taken after the hearing) in suspending, revoking or reprimanding a licensee or longshoreman shall be subject to judicial review in the manner provided by state law for "review of the final decision or action of administrative agencies".

The Compact thus specifically provides only for judicial review of the "final decision or action" of the Commission and then only in the state courts. Plainly, there has been no "final decision of action" of the Commission and therefore the instant interlocutory judicial review, particularly where sought in the federal courts, may not be had. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375.

## II

## The injunction against petitioner's testimony in New York's criminal prosecution is prohibited by Section 2283 of the Judicial Code.

The injunction herein against petitioner's testimony in New York's criminal prosecution in effect stays, and has stayed, the prosecution. For petitioner's testimony is indispensable to the prosecution and we represent to this Court that, if this injunction stands, New York will be required to dismiss its criminal case against respondent Bolger.

1. Section 2283 of Title 28 (the Judicial Code) of the United States Code expresses a long-standing rule of comity. It is "a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts". *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9.

Since Section 2283 embodies a rule of comity, the actual impact of the injunction upon the state court proceedings, rather than the form of the injunction, is perforce controlling under Section 2283. Hence, the interdiction of Section 2283 is not confined to an injunction against the state court *eo nomine*. "That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial". *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co., supra*, at page 9. Further, the prohibition in Section 2283 is against a stay of "proceedings in a State court", a term which is entirely comprehensive. As this Court stated in *Hill* v. *Martin*, 296 U. S. 393, 403:

> "The prohibition of section 265 [section 2283] is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. And it governs a privy to the state court proceeding—like

> Elinor Dorrance Hill—as well as the parties of record. Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions to section 265. It is not suggested that there is a basis here for any such exception."

It follows that the instant injunction against petitioner, a state officer whose testimony is indispensable to New York's prosecution, is inconsistent with the comprehensive policy of comity embodied in Section 2283 and constitutes therefore "an injunction to stay proceedings in a State court" that is prohibited by Section 2283. Otherwise, the way would be open to a wholesale circumvention of Section 2283 through the simple device of directing the injunction against critical witnesses or evidence. Further, the injunction against petitioner is equivalent to an injunction against the State of New York as a party, for the State is not a natural person and can only act as a party through its officers, attorneys and agents. As was asked rhetorically by the Court in *Harkrader* v. *Wadley*, 172 U. S. 148, 169, holding that it was impermissible under Section 2283 for a federal court to restrain the prosecuting attorney of a State from prosecuting an indictment:

> "How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

The state officer—here petitioner—in possession of indispensable evidence is as much one of the "officers, attorneys and agents" of the State and is as vital to the State's

prosecution as is the prosecuting attorney. Plainly, in terms of comity, no valid distinction can be drawn between enjoining the indispensable testimony of petitioner and enjoining the prosecuting attorney, since the impact upon the prosecution is precisely the same.

2. The court below stated that the *Rea* case is "ample authority" for holding that the injunction here was not prohibited by Section 2283 (R. 42). However, the injunction in *Rea* came within one of the express exceptions to Section 2283 and accordingly *Rea* is inapposite here.

In *Rea*, as noted, there was a prior federal suppression order, the effect of which was that the suppressed evidence "shall not be admissible in evidence at any hearing or trial" and the motion to enjoin in *Rea* was made "to prevent the thwarting of the federal suppression order". *Wilson* v. *Schnettler, supra*, 365 U. S., at p. 387. Hence, the injunction in *Rea* was clearly ancillary to the prior suppression order and therefore came within the express exception of Section 2283 prohibiting a stay of state court proceedings by a federal court "except • • • where necessary • • • to protect or effectuate its judgments", the term "judgment" encompassing interlocutory as well as final orders. *Sperry Rand* v. *Rothlein*, 288 F. 2d 245 (2nd Cir. 1961).

Furthermore, the injunction in *Rea* was against a *federal* officer, rather than, as here, a *state* officer. This is another basic reason why *Rea* is not authority for the injunction here against petitioner, a *state* officer.

3. Nor does the fact that the Civil Rights Act (*i.e.*, 28 U.S.C. 1343(4)) is the apparent basis for federal jurisdiction herein bring this case within the exception of Section 2283 prohibiting an injunction to stay court proceedings "except as expressly authorized by Act of Congress". Though the complaint does not set forth any basis for federal jurisdiction, the District Court thought that federal

jurisdiction could be predicated, at least insofar as the custom officers were concerned, upon the provisions of 28 U.S.C. 1343(4) conferring the District Courts with jurisdiction over any action "under any Act of Congress providing for the protection of civil rights, including the right to vote (R. 21, footnote 1). The District Court reached this result by reasoning that the Federal Rules of Criminal Procedures create substantive federal rights, apparently enforceable independently of any federal criminal proceeding, and thus may be considered to be an "Act of Congress providing for the protection of civil rights, including the right to vote." But, as has been pointed out, the conclusion that the Federal Rules create substantive rights enforceable independently of any federal criminal proceeding is highly questionable, particularly with respect to testimony by petitioner, a *state* officer, in a *state* criminal prosecution.

Even assuming that the Federal Rights of Criminal Procedures do create such substantive rights, there is the further question whether the Federal Rules are an "Act of Congress providing for the protection of civil rights, including the right to vote". While the Federal Rules may have the force and effect of statutory law for their intended purposes (*i.e.*, to "govern the procedure . . . in all [federal] criminal proceedings"; Rule 1, F. R. Crim. P.), just as an administrative regulation may have the force and effect of statutory law for its intended purposes, certainly the Federal Rules are not, *strictissimi juri*, an Act of Congress. Nor would the Federal Rules appear to be an "Act of Congress providing for the protection of civil rights, including the right to vote" within the intendment of 28 U.S.C. 1343(4). For Section 1343(4) of Title 28 was enacted as part of the Civil Rights Act of 1957 (71 Stat. 634, 637) and the legislative history shows that Section 1343(4) was enacted as "merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceding section of the bill",

that is, the *Congressionally enacted* Civil Rights Act of 1957. H. Rep. No. 291, 85th Cong., 1st Sess., p. 11. Thus, no sweeping and radical enlargement of the jurisdiction of the District Courts was intended by Congress in enacting Section 1343(4) of Title 28 and accordingly federal jurisdiction as against petitioner cannot be grounded upon Section 1343(4). (Petitioner contended from the beginning that there was no basis for federal jurisdiction as against him (R. 6). However, in light of this Court's intervening decision in *Mapp*, jurisdiction may presumably be predicated on the general grant of federal question jurisdiction in 28 U.S.C. 1331. Though respondent Bolger has neither alleged nor sought to prove that the jurisdictional amount of $10,000 is in controversy, he probably could do so since his right to work on the waterfront is involved in the Waterfront Commission's proceedings against him.)

In any event the Civil Rights Act (*i.e.*, 28 U.S.C. 1343(4)), as stated, does not come within the exception of Section 2283 prohibiting an injunction of state court proceedings "except as expressly authorized by Act of Congress". This question has engendered a conflict in decision among the lower federal courts. Some decisions have held that the Civil Rights Act is not within this exception to Section 2283. *Smith* v. *Village of Lansing*, 241 F. 2d 856 (7th Cir. 1957); *Island Steamship Lines, Inc.* v. *Glennon*, 178 F. Supp. 292 (D. Mass. 1959); *Aultman & Taylor* v. *Brumfield*, 102 Fed. 7, 12 (C.C.N.D. Ohio), appeal dism'd, 22 Supp. Ct. 938; *Cf. McQuire* v. *Amrein*, 101 F. Supp. 414, 420 (D. Md. 1951); *Mickey* v. *Kansas City, Mo.*, 43 F. Supp. 739, 742 (W.D. Mo. 1942). Other decisions have held to the contrary. *Cooper* v. *Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950); *International Longshoremen's & Warehousemen's Union* v. *Ackerman*, 82 F. Supp. 65, 106-112 (D. Hawaii 1948), rev'd upon another ground, 187 F. 2d 860, cert. den. 342 U. S. 859. Cf.

*Tribune Review Publishing Co.* v. *Thomas*, 153 F. Supp. 486 (W. D. Penn. 1957), aff'd upon another ground, 254 F.2d 883. It is our contention that the former decisions are correct.

It is true that an Act of Congress "need not expressly refer to § 2283" to come within the statutory exception. *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511, 516. But the only Acts of Congress which have been held to come within the exception in question either have pre-empted the subject matter and vested the federal courts with exclusive jurisdiction over enforcement of a federal regulatory scheme, *Amalgamated Clothing Workers* v. *Richman Brothers*, *supra*, or have explicitly contemplated the cessation of all other court proceedings with respect to the same subject matter, such as the Removal Act, the Interpleader Act, the Frazer-Lemke Farm-Mortgage Act, and the Act of 1851 limiting the liability of shipowners. *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 132-4. The Civil Rights Act is no such Act. Rather, it simply particularizes an area of the federal question jurisdiction for which no jurisdictional amount is required, similar, for example, to the jurisdiction based upon any Act of Congress regulating commerce (28 U.S.C. 1337). The Civil Rights Act accordingly is not an Act of Congress that vests exclusive jurisdiction in the federal courts. Cf. *Romero* v. *Weakley*, 226 F. 2d 399 (9th Cir. 1955); nor is it an Act that contemplates, explicitly or otherwise, the cessation of all other court proceedings with respect to the same subject matter.

There is therefore no warrant for viewing the Civil Rights Act as within the exception of Section 2283 prohibiting an injunction "except as expressly authorized by Act of Congress". Section 2283 "is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislature policy is here expressed in a clean-cut prohibition qualified only by specifically defined exceptions". *Amalgamated Clothing Workers* v. *Richman Brothers*,

*supra*, 348 U. S. at pp. 515-16. And since the Civil Rights Act does not come within the specifically defined exception, the Court is prohibited, as itself stated, from "taking the liberty of interpolation when Congress clearly left no room for it". *Amalgamated Clothing Workers* v. *Richman Brothers, supra*, 348 U. S. at p. 516.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed with appropriate directions for the dismissal of the complaint.**

Respectfully submitted,

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